No. 12,960

IN THE

United States Court of Appeals

For the Ninth Circuit

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA, a corporation,
Appellant,

vs.

MILDRED A. DUNWOODY, HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH, and DORIS G. BARUH,
Appellees.

APPELLANT'S BRIEF.

BERT W. LEVIT,
DAVID C. BOGERT,
LONG & LEVIT,
605 Merchants Exchange Building, San Francisco 4, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

No. 12,960

IN THE

United States Court of Appeals

For the Ninth Circuit

HARDWARE MUTUAL INSURANCE CO. OF MINNESOTA, a corporation,
Appellant,

vs.

MILDRED A. DUNWOODY, HAROLD A. GOLDMAN, MYRTLE GOLDMAN, HAROLD F. BARUH, and DORIS G. BARUH,
Appellees.

APPELLANT'S BRIEF.

JURISDICTIONAL STATEMENT.

Appellant (plaintiff) commenced this action in the United States District Court for the Northern District of California, Southern Division, by complaint for declaratory relief (R 3-7), filed pursuant to the Federal Declaratory Judgment Act (28 *USC* 2201). The complaint alleges (R 3-4) and the answers admit (R 8, 27) that there is complete diversity of citizenship between appellant and each appellee, and that the amount in controversy between appellant and each appellee exceeds the sum of $3000. The appeal is from

a final judgment, rendered after trial, adjudging that appellee Dunwoody recover $10,000 from appellant, and that appellant is not entitled to be subrogated to the rights of said appellee against the other appellees upon the payment of said sum (R 82-3).

Jurisdiction of this cause is conferred on the District Court by 28 *USC* 1332. Jurisdiction to review the judgment herein is conferred upon this Court by 28 *USC* 1291 and 1294.

STATEMENT OF CASE.

Appellant is an insurance company. It issued to appellee Dunwoody a policy of fire insurance covering on two buildings in Chico, California, in the amount of $10,000 (R 38); the policy is attached as Exhibit "A" to the factual stipulation entered into by the parties (R 37, 39, 45). These buildings were totally destroyed by fire on 8 April 1949 (R 41), during the term of the policy.

Appellee Dunwoody was the owner of the buildings. She had leased them to Grand Rapids Furniture Company for 50 years commencing 1 January 1944, by written lease dated 1 November 1943 (R 77). The interest of the lessee was transferred to the other appellees as successor lessees, and these appellees continued as and still are lessees of the premises in question (R 77). By certain supplemental agreements entered into between appellee Dunwoody as owner and lessor, and the remaining appellees as lessees, appel-

lees Myrtle Goldman and Doris Baruh were purportedly released from some of the terms of the original lease, but appellees Harold Goldman and Harold Baruh remained bound by all of the terms of the original lease (R 18-27, 77-9).

The lease (Paragraph 12) provided that in the event of a destruction of the demised premises by fire, "the same shall be restored by the Tenant at its own expense without unnecessary delay" (R 40). The trial court found that this obligation to rebuild was obligatory upon the lessees, and in particular upon appellees Harold Goldman and Harold Baruh (V; R 78-9); and the trial court made the following conclusion of law thereon (III; R 80):

> "That the defendants Harold A. Goldman and Harold F. Baruh are legally bound by and to perform the obligations of the tenants of the premises upon which the buildings were destroyed by fire, and to restore the buildings destroyed by fire as provided in paragraph 12 of the . . . lease . . ."

The judgment similarly provides (III; R 83):

> "The defendants Harold A. Goldman and Harold F. Baruh are legally bound by and to perform the obligations of paragraph 12, and all the provisions of that certain lease dated November 1, 1943, in which the said premises and buildings . . . were leased by [appellee] Dunwoody . . ., to the Grand Rapids Furniture Company for a period of fifty (50) years from January 1, 1944, and which lease was later . . . assigned by the Grand Rapids Furniture Company to [appel-

> lees] Harold F. Baruh and Harold A. Goldman . . ., and as provided by the provisions of said paragraph 12, said defendants are obligated to restore the buildings destroyed."

At the time of the trial replacement of the buildings had not yet been undertaken, this having been delayed by the lessee appellees with the consent and approval of appellee Dunwoody, the owner (R 42).

Appellant's complaint for declaratory relief asked the court to determine whether appellee Dunwoody had suffered any loss, in view of the lessees' obligation to rebuild (IX; R 6); and asserted that if the court should determine that appellee Dunwoody did suffer a loss under the policy which appellant must pay, appellant "will then be subrogated" to appellee Dunwoody's rights against the other appellees under the lease (X; R 6).

The complaint also contains allegations concerning a policy of insurance issued by another insurer and suggests that a question of apportionment of loss might arise as between that insurer and appellant (VII, XI; R 5-7). It subsequently developed by stipulation, however, that the loss by fire was in excess of the total amount of fire insurance. This eliminated any question of apportionment, and the other insurer was dismissed from the case.

The trial court adjudged: (1) That appellee Dunwoody should have judgment against appellant for $10,000, the full face amount of the policy of insurance; (2) That appellees Harold Goldman and Harold

Baruh are obligated to restore the buildings destroyed; and (3) That appellant "is not entitled to be subrogated to any of the rights of the said Mildred A. Dunwoody or at all, against" the other appellees (R 82-3).

SPECIFICATION OF ERRORS.

I. The trial court erred in finding and holding that upon the payment of $10,000 by appellant to appellee Dunwoody pursuant to the judgment of the court, appellant is not entitled to be subrogated *pro tanto* to the rights of appellee Dunwoody against appellees Harold Goldman and Harold Baruh under the lease whereby the last named appellees are obligated to restore the premises.

SUMMARY OF ARGUMENT.

I. Denial of subrogation to appellant violates the fundamental principle that a fire insurance policy is a contract of indemnity.

II. Subrogation of an insurer is not limited to those rights of insured that arise from the tort of a third party; it applies equally to cases where the insured's rights against a third party arise from a contract obligation.

III. An insurer's right of subrogation arises by operation of law and is not dependent upon any express provision therefor in the policy.

IV. Lessee appellees are not entitled to the benefit of appellant's insurance payment to appellee Dunwoody.

ARGUMENT.

I.

DENIAL OF SUBROGATION TO APPELLANT VIOLATES THE FUNDAMENTAL PRINCIPLE THAT A FIRE INSURANCE POLICY IS A CONTRACT OF INDEMNITY.

The trial court decreed that the lessee appellees were obligated to restore the buildings by reason of the terms of their lease. Such restoration will, of course, furnish appellee Dunwoody, the owner, with full indemnification for the loss of the buildings by fire. Indeed, it will give the owner more than full indemnity, because she will have had old buildings replaced by new. In addition, the judgment gives to the owner a $10,000 payment from appellant for the same fire loss.

Sections 22 and 23 of the *California Insurance Code* specify what is indeed the accepted rule of law that a contract of insurance is a contract of indemnity.

> "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." (s 22)
>
> "The person who undertakes to indemnify another by insurance is the insurer, and the person indemnified is the insured." (s 23)

The California courts and this Court have consistently limited the right of recovery under a fire

insurance policy to indemnity only, and nothing more.

Davis v Phoenix Ins Co (1896) 111 C 409, 43 P 1115;

Sievers v Union Assur Soc (1912) 20 CA 250, 128 P 771;

Smith v Jim Dandy Markets (CCA 9, 1949) 172 F2 616.

In the last cited case, this Court said (p 618):

"It is argued that . . . Smith had an insurable interest in the building because of his lien thereon for the payment of the balance of the purchase price, and therefore should recover on his policy . . . This argument fails because, regardless of Smith's interest in the building, he suffered no loss from its destruction. Under California law, which we are required to follow, a fire insurance policy is a personal indemnity contract and a showing of pecuniary damage is prerequisite to recovery thereon."

In view of the fact that the obligation to restore the buildings had not been performed by the lessees at the time of the trial, we do not complain of that part of the judgment which requires the insurer to pay the amount of its policy to appellee Dunwoody. However, since the contract *is* one of indemnity the court should have included in the judgment a declaration that upon full restoration of the buildings appellant would be entitled to a return of the amount so paid, and that in the event of a failure upon the part of lessees to fulfill their obligation to restore the buildings appellant would be entitled to be subrogated to appellee

Dunwoody's right to enforce this obligation—such subrogation to be *pro tanto* to the extent of the amount paid by appellant and subject to the prior right of appellee Dunwoody to have full indemnification for her loss.[1]

II.

SUBROGATION OF AN INSURER IS NOT LIMITED TO THOSE RIGHTS OF INSURED THAT ARISE FROM THE TORT OF A THIRD PARTY; IT APPLIES EQUALLY TO CASES WHERE THE INSURED'S RIGHTS AGAINST THE THIRD PARTY ARISE FROM A CONTRACT OBLIGATION.

> "Insurer's right to subrogation is not limited to cases where the liability of the third person is founded in tort, but any right of insured to indemnity will pass to insurer on payment of the loss, including rights under contracts with third persons . . ." 46 *CJS* 154-5; Insurance, s 1209, n 17-20.

---

[1]The prayer of the complaint (R 7) merely asks that judgment be entered against lessee appellees in the amount of any judgment entered against plaintiff in favor of appellee Dunwoody. However, the prayer also contains the usual general prayer for "other and further relief", and it is well settled that this is sufficient to authorize such declaration and decree as is appropriate under the pleadings and the issues tried.

FRCP, Rule 54(c);

Borchard, Declaratory Judgments (2d Ed), ch X, p 425, 426-7;

Anderson, Declaratory Judgments, s 97, p 256 ff.

The complaint (X, R 6) sufficiently asserts the right of appellant to be subrogated to appellee Dunwoody's rights under the lease against the lessee appellees; and the findings and conclusions of the trial court (R 75-80) as well as the judgment (R 81-4) show that the case was tried and decided upon that theory.

The rule is illustrated by cases where subrogation has been allowed to an insurer against a common carrier responsible to the insured under the contract of carriage for the loss of the insured property.

Mobile etc R Co v Jurey (1883) 111 US 584, 4 SCt 566, 28 LEd 527, 529;

Garrison v Memphis Ins Co (1856) 19 How 312, 15 LEd 656;

Liverpool etc Co v Phenix Ins Co (1888) 129 US 397, 9 SCt 469, 32 LEd 788, 799;

Phoenix Ins Co v Erie etc Co (1885) 117 US 312, 6 SCt 750, 29 LEd 873, 878-80;

Hall v Nashville etc R Co (1871) 13 Wall 367, 20 LEd 594, 596-7;

6 *Appleman, Insurance Law,* s 4056, p 538 ff.

The rule is also illustrated by those cases which subrogate an insurer under a single-interest[2] policy issued to a mortgagee, to the latter's right against the mortgagor to repayment of the mortgage debt.

Fields v Western etc Ins Co (NY 1943) 48 NE2 489, 146 ALR 434, 438:

"Of course if a policy is issued to the mortgagee, procured by him and so written as to cover his interest only, then the owner can claim no rights under it and the insurer may be subrogated as against the owner-mortgagor. Such situations are dealt with in cases like *Excelsior*

[2]We use the term "single-interest" to distinguish those cases in which the mortgagor is named in the policy along with the mortgagee or where the mortgagor himself has obtained the policy from the insurer and paid the premium on it, from cases where the mortgagee acts independently to procure insurance to protect his own insurable interest without naming the mortgagor as a party insured.

F Ins Co v Royal Ins Co of Liverpool, 55 NY 343, 14 AmRep 271: 'It is settled that when a mortgagee, or one in like position toward property, is insured thereon at his own expense, upon his own motion and for his sole benefit, and a loss happens to it, the insurer, on making compensation, is entitled to an assignment of the rights of the insured.' "

Baker v Monumental etc Assn (WVa 1905) 52 SE 403, 3 LRANS 79, 112 ASR 996;

Milwaukee etc Ins Co v Ramsey (Or 1915) 149 P 542, LRA 1916A 556, 558, AnnCas 1917B 1132 (and Annotation, p 1135).

The carrier and mortgagee cases are merely illustrative, and the rule of subrogation[3] is by no means limited to these situations.

In *Automobile Ins Co v Union Oil Co* (1948) 85 CA2 302, 193 P2 48, a fire insurer was subrogated to the cause of action of its insured against a manufacturer of floor cleaning compound, where the fire was caused by breach of an implied warranty in the contract of sale of the compound that it was noninflammable.

---

[3] *Western Casualty etc Co v Meyer* (Ky 1946) 192 SW2 388, 164 ALR 769, 777:

"From time immemorial it has been pointed out that, when not depending on express agreement, the principle of subrogation is a principle of equity—of compelling the ultimate discharge of an obligation by him who in good conscience ought to pay it to him who has done so for the obligor, unless he was an intermeddler or volunteer. It is closely akin to, if not a part of, the equitable principle of restitution and unjust enrichment . . . Equity is the same everywhere. The traditional principles . . . are universal in English and American jurisprudence."

In *Chicago etc R Co v Pullman etc Co* (1890) 139 US 79, 11 SCt 490, 35 LEd 97, the Pullman company had leased cars to the railroad company under a lease which provided that the lessee must repair all damage caused by accident or casualty to the leased cars. One car was destroyed by fire. Pullman's insurance carriers paid the loss to Pullman, and the latter then filed suit against the lessee for the benefit of the insurance companies. It was held that the insurance payment did not inure to the benefit of the lessee, and that the insurance company was entitled to subrogation. The Supreme Court said (35 LEd, 101):

> "The acceptance of a given amount from the insurance companies in full discharge of their liability did not affect the right of the plaintiff to recover from the Railroad Company the whole amount of the loss for which the latter was responsible under its contract. The plaintiff could recover only one satisfaction for the loss; and if the amount recovered from the Railroad Company, increased by the sum collected from the insurance companies, was more than sufficient for its just indemnity, the excess would be held by it in trust for the insurance companies . . . 'The general rule of law . . . is that, where there is a contract of indemnity . . . and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.' "

Vahlsing Inc v Hartford F Ins Co (Tex 1937) 108 SW2 947 was a similar case where the defendant had leased railroad cars under a lease agreement which required it to pay for any fire damage to the cars. A loss was paid by lessor's insurance carrier, and the insurer then sued the lessee by way of subrogation. The lessee challenged the right of the insurer to recover, in the absence of pleading and proof that the fire was caused by lessee's negligence. Judgment for the insurer was upheld on appeal, on the ground that the insurer was entitled to recover upon lessee's contractual liability to the insured lessor.

The underlying basis for extending the right of subrogation to contract cases was well stated by Lord Justice Brett many years ago in *Castellan v Preston* (1883) 11 QBD 380, 386, 388:

> "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to stay, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong."
>
> "Now it seems to me that in order to carry out the fundamental rule of insurance law, this doc-

trine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued."

In *Darrell v Tibbitts* (1878) 5 QBD 560, a tenant leased a house from the owner under a lease which required him to repair it. The house was destroyed by an explosion. The owner collected under his insurance policy, and the tenant subsequently restored the house. The insurer then sued to recover the money it had paid to the owner. Judgment in favor of the owner was reversed on appeal. Lord Justice Brett made a statement in the opinion peculiarly applicable to the present case (p 561):

"It seems to me . . . that if the tenants had not repaired the damage, and had declined to do so, the insurance company would have been bound to pay the landlord who had insured with them, but would have had a right to bring in his name an action against the tenants, and recover from the tenants what they had paid to the landlord; in other words, a policy of fire insurance is a contract of indemnity . . ."

See, also:

Nashville Industrial Corp v US (1930) 69 CtCl 443;

Continental Ins Co v Bahcall Inc (DC Wis, 1941) 39 FS 315;

Regan v NY etc R Co (Conn 1891) 22 A 503, 25 ASR 306, 314-319;

46 *CJS* 178; *Insurance*, s 1211, n 29-31;

8 *Couch, Cyclopedia of Insurance Law* 6645;

5 *Joyce on Insurance* (2d Ed) 5913.

III.

AN INSURER'S RIGHT OF SUBROGATION ARISES BY OPERATION OF LAW AND IS NOT DEPENDENT UPON ANY EXPRESS PROVISION THEREFOR IN THE POLICY.

The California cases have uniformly held that the right of an insurer to subrogation arises by operation of law, and does not depend upon any language in the insurance policy.

Offer v Superior Court (1924) 194 C 114, 228 P 11, 12-13;

Dibble v San Joaquin Light & Power Co (1920) 47 CA 112, 190 P 198;

Automobile Ins Co v Union Oil Co (1948) 85 CA2 302, 193 P2 48;

14 *CalJur* 592; Insurance, s 127.

As was said in *Federal Ins Co v Detroit F&M Ins Co* (CCA 6, 1913) 202 F 648, 651:

"Most of the insurers obtained subrogation receipts from the owner upon paying their shares of its loss, some of which in terms provided for full subrogation, and others 'to the extent only and as provided in' the policies, although the

policies do not appear to have contained any provision for subrogation. However we do not regard this as important, nor do counsel for either side, because it is settled that such provisions are not necessary. The right of subrogation arises from the very nature of the contract of insurance as a contract of indemnity. (Cits)"

See, also:[4]

46 *CJS* 154; Insurance, s 1209, n 8;

Brown v Merchants Marine Ins Co (CCA 9, 1907) 152 F 411, 413;

National etc Ins Co v US (CA 9, 1948) 171 F2 206, 207;

National Garment Co v NY etc R Co (CA 8, 1949) 173 F2 32, 37.

The insurance policy in the case at bar contains the following provision (R 47; photostat of policy, lines 144-6):

"Subrogation. If this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

It is clear that this provision relates only to subrogation against tort feasors or wrongdoers, and has

[4]Many of the cases cited in the immediately preceding subdivision of this brief are also authority upon this point.

no application to the instant situation. In the trial court appellees argued[5] that this paragraph had the effect of limiting the insurer's right of subrogation to cases comprehended by its provisions, namely, to tort cases. Appellees cited and relied upon the case of *Merchants Fire Assur Corp v Hamilton Co* (RI 1949) 69 A2 551.

The *Merchants* case, however, did not hold that the right of subrogation was limited to tort cases. It merely held that when the insurer claimed subrogation against a tort feasor under a policy containing a subrogation clause similar to the one in the policy here, the provisions of the clause must be complied with and the insurer must assert its claim of subrogation not later than the time it pays the loss; the court held that the insurer had waived its right of subrogation because it had not done this. The holding is correct. The policy expressly provided for subrogation in tort cases, and those provisions were doubtless intended to be the measure of that right.

It is quite another thing to say (as appellees argued) that because a policy of insurance specifically provides for subrogation against tort feasors (as fire policies generally do), no subrogation *except against tort feasors* will be permitted to the insurer. Where, as here, the subrogation claimed by the insurer arises from contract rather than from tort liability, the most that can be said is that the policy is silent upon the subject and that subrogation should be granted or

[5]We believe that the trial court accepted this argument.

denied under the general equitable principles applicable under the facts of the case.

The authorities support this view.

The Rhode Island court in the *Merchants* case relied upon the leading case of *Fire Assn v Schellenger* (NJ 1915) 94 A 615, in support of its position. It also cited two Georgia cases. All of the cases cited by the court involved subrogation against tort feasors. Yet in both New Jersey and Georgia, the right of an insurer to subrogate against a third party whose liability is founded in *contract* has been upheld.

Leyden v Lawrence (NJ 1911) 81 A 121 (aff'd 85 A 1134);

Gainesville etc Bank v Martin (Ga 1939) 1 SE2 636.

In *Fields v Western etc Ins Co* (NY 1943) 48 NE2 489, 146 ALR 434, the New York Court of Appeals was dealing with subrogation of a fire insurer to the rights of its insured under a conditional sales contract covering the insured property. The court treated the policy as though it contained no subrogation clause at all, because the subrogation clause which it did contain was inapplicable to the situation with which the court was dealing.

IV.

LESSEE APPELLEES ARE NOT ENTITLED TO THE BENEFIT OF APPELLANT'S INSURANCE PAYMENT TO APPELLEE DUNWOODY.

Paragraph 12 of the lease (R 40-1) obligates lessee appellees to restore the premises damaged or destroyed by fire at their own expense. It further provides that lessee appellees must keep the premises insured against loss by fire by policies of fire insurance naming both the lessees and the owner (appellee Dunwoody).[6] Such a policy was the one issued by Security Insurance Company, referred to in the complaint (VII; R 5), in the answer of lessee appellees (IV; R 11),[7] and in the stipulation of facts (VII; R 41-2).

The same paragraph of the lease also provides that if the lessees carry the required insurance, the owner shall not carry

> "any additional or other fire insurance covering any interest in the demised premises without the knowledge and consent of the Tenant, but if the Landlords shall desire to carry additional insur-

---

[6]"* * * The Tenant covenants and agrees that it, the Tenant, shall at all times during the term hereof and at its own expense keep any and all buildings or improvements now upon or hereafter constructed or placed upon said premises, insured against loss or damage by fire in an amount equal to eighty (80) per cent of the full insurable value thereof above the foundation walls. All such policies of insurance shall be payable to the Landlords and Tenant as their interest may appear * * *. * * * The Landlords shall be furnished with the usual certificates from insurance companies showing the existence of such policies. In case of loss, the Tenant is hereby authorized to adjust the loss and execute proofs thereof in the names of both the Tenant and the Landlords. * * *"

[7]The answer of appellee Dunwoody admits the allegations of paragraph VII of the complaint (I; R 27).

ance and request the Tenant to consent thereto, its consent shall not be unreasonably withheld . . ."

Appellee Dunwoody procured appellant's policy under this provision of the lease, insuring exclusively her own interest in the premises as owner; it was, therefore, a single-interest policy. This is clear from the policy itself. It is also clear from the allegations of the answers filed by appellees:

"* * * This defendant Mildred A. Dunwoody sought and received the consent of the defendants, Harold A. Goldman, Myrtle Goldman, Harold F. Baruh and Doris G. Baruh, to carry insurance upon the said building or buildings; and that pursuant to said consent this defendant Mildred A. Dunwoody *insured her interest as owner of said property* with said plaintiff and which insurance was covered and evidenced by plaintiff's said policy No. 4-24777." (Answer of appellee Dunwoody, III; R 30.)

"* * * Said defendant Mildred A. Dunwoody sought and received the consent of these defendants to carry insurance upon the said building or buildings in addition to the insurance thereon theretofore effected by these defendants and then in effect and in effect at the time of said fire, and that pursuant to said consent said defendant Dunwoody *insured her interest as owner of said property* with said plaintiff and which insurance was covered and evidenced by plaintiff's said policy No. 4-24777." (Answer of lessee appellees, III, R 11.)

Despite these undisputed facts, lessee appellees took the position at the trial, and were sustained in that position by the judgment of the court, that the proceeds of appellant's policy inured to their benefit and were to be applied to the cost of restoration of the burned buildings in satisfaction, *pro tanto,* of their obligation under the lease to restore the premises at their own expense. In this connection, an interrogatory propounded by appellant to and answered by appellee Dunwoody is of interest (R 69, 74):

> "Interrogatory No. 12. Has any agreement been made by you with the other defendants, or any of them, relative to the application of the proceeds of insurance policies to the reconstruction of the buildings leased by you to them?"
>
> "12. I have been requested by Mr. Baruh and Mr. Goldman to apply the proceeds that I may receive from [appellant's] policy on the rebuilding of the destroyed buildings. I have neither told them that I would or would not . . . The buildings should be rebuilt; the lease provides that Mr. Goldman and Mr. Baruh will rebuild them. In this suit, however, they are claiming that they are not required to rebuild them . . ."[8]

---

[8]As has been noted, the trial court concluded that appellees Harold Goldman and Harold Baruh were obligated by the lease to restore the buildings. (Findings of Fact, V, R 78-9; Conclusions of Law, III, R 80; Judgment, III, R 83.)

The judgment appealed from should be reversed.

Dated, San Francisco, California,
4 September 1951.

Respectfully submitted,
BERT W. LEVIT,
DAVID C. BOGERT,
LONG & LEVIT,
Attorneys for Appellant.